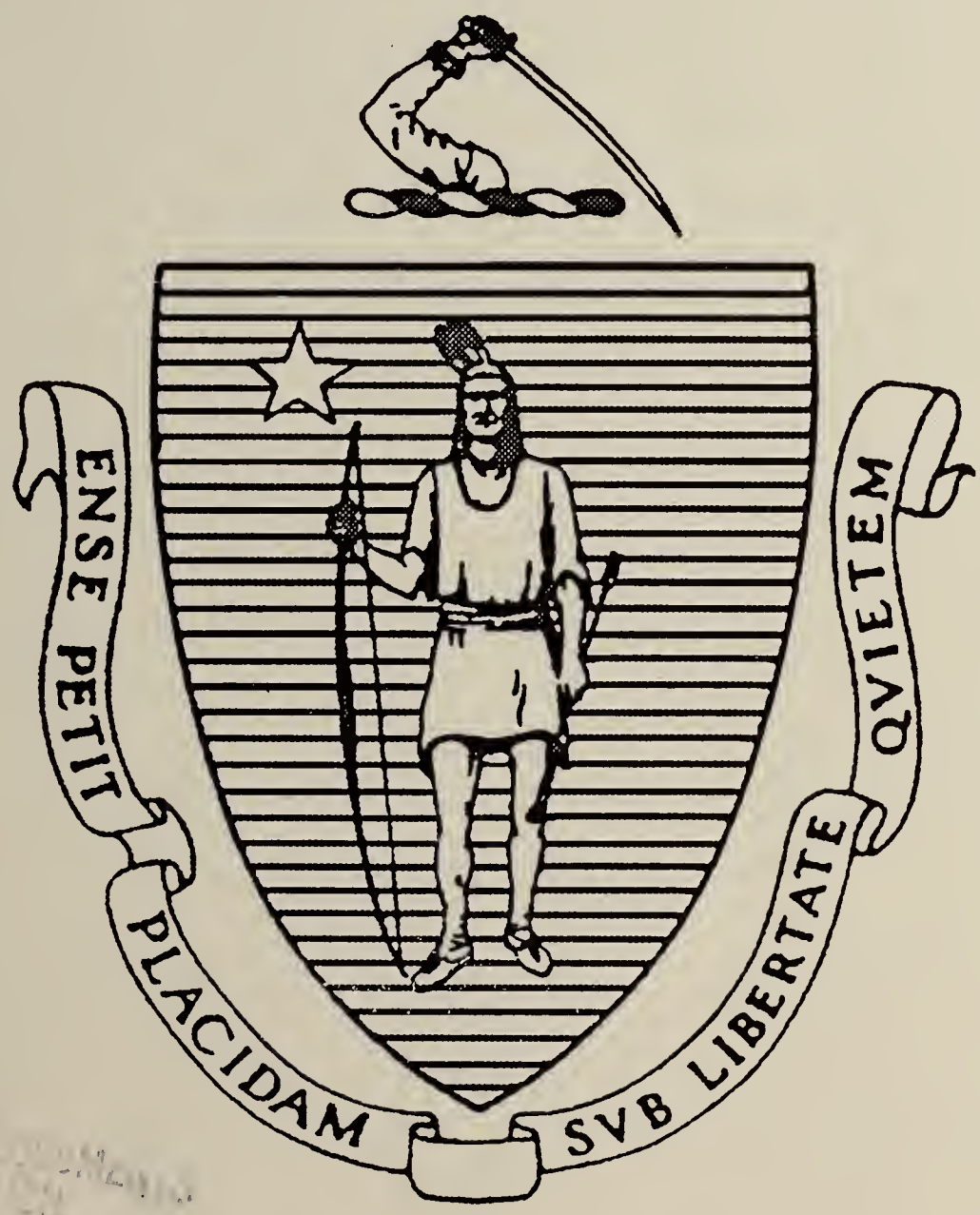
Massachusetts Department of Public Welfare



Fair Hearing Rules
106 CMR 343-343.370

Massachusetts Department of Public Welfare

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SECTION

343.010: Purpose

The purpose of this chapter is to set forth procedures that govern the conduct of adjudicatory proceedings whereby dissatisfied applicants, recipients, institutions and certain sponsors of aliens seek a review of certain actions or inactions on the part of the Department of Public Welfare.

343.020: Authority

The authority for the regulations set forth in this chapter is 42 CFR 431.200 et seq., 45 CFR 205.10, Massachusetts General Laws, c. 18, §§16 and 16A, c. 30A, C. 118E, §§8 and 22, and 801 CMR 1.03(7).

343.030: Citation

References to this chapter will be cited as 106 CMR 343 followed by the particular section numbers.

343.040: Scope

This chapter sets forth the exclusive procedures governing adjudicatory proceedings initiated by applicants, recipients, institutions and certain sponsors of aliens under the programs of Aid to Families with Dependent Children (AFDC), Refugee Resettlement (RRP), Emergency Assistance (EA), Medical Assistance (MA), and Emergency Aid to the Elderly, Disabled and Children (EAEDC). These procedures also govern adjudicatory proceedings initiated by applicants or recipients of the CommonHealth program. Appeals pursuant to the Department of Elder Affairs Supplementary Rules to the Adjudicatory Rules of Practice and Procedures 651 CMR 1.00 et seq., are governed by the procedures set forth in this chapter. Proceedings arising under the Food Stamp program are governed by 106 CMR 367, except matters not addressed therein shall be governed by this chapter. Adjudicatory proceedings initiated by providers in the MA program (except those entitled to a fair hearing under these regulations) are governed by 106 CMR 450.322. Proceedings under the Fair Information Practices Act are governed by 106 CMR 107. If appeals of federal and state income tax refund intercept to set off alleged child support arrearage or of child support matters are conducted by the Division of Hearings for the Department of Revenue, the decision rendered in those hearings is a decision of the Department of Revenue. The Department may enter into interdepartmental service agreements with other state agencies to conduct hearings in accordance with these regulations.

343.050: Definitions

(A) Adequate Notice

A notice concerning an intended action to reduce, suspend or terminate assistance or to change the manner or form of payments to a protective, vendor, or two-party payment, or to deny a prior approval request for services, which contains the elements listed in 106 CMR 343.200(A).

(B) Appellant

An applicant, recipient, institution or certain sponsors of aliens requesting a fair hearing.

(C) Applicant

A person or family who has applied or attempted to apply for a program administered by the Department of Public Welfare, including the CommonHealth program.

(D) Assistance

Any financial or medical assistance provided by the Department, including CommonHealth benefits.

(E) Authorized Representative

Any person, such as a legal counsel, a relative, or a friend, who is authorized in writing by the appellant to represent him or her at the hearing.

(F) Cyclical Month

The monthly check issuance cycle which is the period of time equal in length to a calendar month, but which begins and ends on a date determined by the Department by using the recipient's social security number.

(G) Department

The Department of Public Welfare of the Commonwealth of Massachusetts.

(H) DOH

Division of Hearings within the Department of Public Welfare.

(I) Fair Hearing

A proceeding where the legal rights, duties, benefits, or privileges of persons, agencies, and institutions are determined.

(J) Interpreter

A person who translates for the appellant, when the appellant's primary language is not English or when the appellant is deaf or hearing-impaired. The interpreter is sworn to make an impartial and accurate translation of the events occuring at the hearing.

(K) Institution

Any licensed hospital, any licensed nursing home, or public medical institution.

(L) Party

The appellant or the Department.

(M) Recipient

A person or family who is or had been receiving assistance under a program administered by the Department of Public Welfare, including the CommonHealth program.

(N) Referee

An impartial and independent person designated by the Director of the Division of Hearings to conduct hearings and render decisions pursuant to these regulations. A referee is impartial in that he or she attempts to secure equitable treatment for all parties and he or she must have no prior involvement in any matter over which he or she conducts a hearing, except in a capacity as a referee. No referee who has a direct or indirect interest, personal involvement or bias in a hearing shall conduct a hearing in said matter, nor shall he or she participate in the decision-making process of such matters.

(O) Timely Notice

A timely notice shall be adequate notice which meets the additional requirements set forth in 106 CMR 343.140. Prior to an intended action to reduce, suspend or terminate assistance, the Department must send a timely notice to the recipient except as provided in 106 CMR 302.900 et. seq. and 106 CMR 343.210. A timely notice is a notice mailed at least 10 calendar days prior to the action.

(P) Timely Request

A timely request for a hearing is one received by DOH within the timely notice period.

343.100: The Division of Hearings (DOH)

The Division of Hearings (DOH) in the Office of the Deputy Commissioner has the responsibility for administering the fair hearing process, holding hearings, and rendering decisions. DOH is administered by a Director who is appointed by the Commissioner. DOH is wholly separate and independent from all other offices and divisions of the Department and from all other personnel of the Department. No person shall attempt to interfere with or influence the independence of DOH, the decision of the referee, or the implementation of the decision. No person shall review the decision of the referee prior to the rendering of the decision.

343.110: General Description of the Fair Hearing Process

The fair hearing process is an adjudicatory proceeding whereby dissatisfied applicants, recipients, institutions, and certain sponsors of aliens can, upon written request, obtain a determination of the appropriateness of certain actions or inactions on the part of the Department, or of alleged coercive or otherwise improper conduct by a Department employee. The process is designed to secure and protect the interests of both the appellant and appropriate Department personnel and to ensure equitable treatment for all involved. A hearing is conducted by an impartial referee of DOH. The decision of the referee is based only on those matters which are presented at the hearing. The referee examines the facts, the law, and the other circumstances of the case presented by the parties to determine the legality and appropriateness of the Department's or Department employee's action or decision of the Department. It is binding upon the Department and is not subject to any review within the Department, except that appeals where the issue involves medical assistance may be subject to review as provided in Section 343.700 of this chapter.

343.130: Compilation of Fair Hearing Decisions

DOH will compile all of the fair hearing decisions for each calendar month. Copies of this compilation will be available to the public at DOH after steps have been taken to delete personal data, including the appellant's name and address, in order to protect the confidentiality of public assistance information.

343.140: Time Limits

(A) Timely Notice

Prior to an intended action to reduce, suspend or terminate assistance, the Department must send a timely notice to the recipient except as provided in 106 CMR 302.900 et. seq. and 106 CMR 343.210. A timely notice is a notice mailed at least 10 calendar days prior to the action.

(B) Time Limitation on the Right of Appeal

The date of request for a fair hearing is the date on which the Division of Hearings receives a written statement from the appellant asking for the opportunity to present the grievance to a higher authority. The Division of Hearings must receive the request for a fair hearing within the following time limits:

(1) Except in cases involving Medicaid or CommonHealth, 90 days from the date of official written notice of action by the Department. Such notice must include a statement of the right to appeal and the time limit for appealing.

(2) Thirty days after an applicant for or recipient of Medical Assistance or CommonHealth receives official written notice of action. Such notice must include a statement of the right of appeal and the time limit for appealing. In the absence of evidence or testimony to the contrary, it shall be presumed that the notice was received on the third day after mailing.

(3) Unless waived by the Division of Hearings Director or his or her designee, 120 days from:

a. the date of application when the Department fails to act on an application;

b. the date of request for service when the Department fails to act on said request;

c. the date of Department action when the Department fails to send official written notice of the action;

d. the date of the alleged coercive or otherwise improper conduct, but up to one year from the date of the conduct provided that the appellant files an affidavit with the Director of the Division of Hearings stating that, and can establish at a hearing that,

1. he or she did not know of the right to appeal; or

2. he or she reasonably believed that the problem was being resolved administratively; or

3. he or she was justifiably unaware of the conduct in question; and

4. the appeal is made in good faith.

Failure to substantiate the allegation(s) either prior to or at the hearing shall be grounds for dismissal.

(C) Computation of Time

Computation of any period referred to in these rules shall be on the basis of calendar days except where expressly provided otherwise. Time periods shall expire on the last day of such periods unless the day falls on a Saturday, Sunday, legal holiday or other day on which the office of the Division of Hearings is closed, in which event the last day of the time period shall be deemed to be the next following business day.

(D) Time Limits for Rendering Decision

(1) The referee must render a final decision within 45 days of the date of request for a hearing when the issue under appeal is:

a. the denial of the right to apply or reapply for assistance;

b. the denial of an application for assistance;

c. the failure to act on an application in a timely manner; or

d. the failure to render Emergency Assistance or Disaster Benefits for SSI recipients.

(2) The referee must render a final decision within 90 days of the date of request for a hearing for all other appeals.

(3) The time limits set forth in 106 CMR 343.140(D)(1) and 343.140(D)(2) above may be extended for good cause as follows:

a. Where delays are caused by the appellant or his or her representative, the time limits may be extended by the total number of days of such delays, which includes the advance notice period prior to scheduled hearing dates. Such delays include the appellant's delay in the submission of evidence, briefs or other statements, rescheduling or continuances granted at the request or for the benefit of the appellant, and any other delays caused by the actions of the appellant or his or her representative.

b. Where delays occur due to acts of God or serious illness of the referee which makes him or her unable to render a decision, good cause for the extension of the time limits shall be deemed to exist.

(E) Expedited Appeals for Denied Acute Hospital Admissions

When the Department's decision, under the Medicaid Screening Program for Acute Hospital Admission or for Mental Health and Substance Abuse Acute and Nonacute Hospital Admission, denies payment for hospital services prior to the elective admission of a Medical Assistance recipient, the recipient or hospital may request an expedited hearing. When such request is made, a hearing will be scheduled to be held as soon as possible, but no later than seven days from the date the Division of Hearings receives the request, and the referee must render a final decision as soon as possible, but no later than seven days from the date of the hearing. These time limits may be extended pursuant to 106 CMR 343.140(D). A request for an expedited hearing under this paragraph automatically waives the requirement for 10-day advance notice of the hearing under 106 CMR 343.300(A). The appellant will be contacted, orally when possible, at least 48 hours prior to the hearing.

343.150: Authorized Representative

(A) an appellant has the right to be represented at his or her own expense by a person who is authorized in writing to do so or is present at the hearing with the appellant. Such written authorization shall contain the name, address, and telephone number of the representative and the signature of the appellant. This information will be submitted at the hearing where the representative's presence has been unknown prior to the hearing. To have access to the appellant's record, such representative must have authorization in accordance with 106 CMR 100 et. seq. An authorized representative may exercise on a party's behalf any of the rights and powers vested in that party by these rules.

(B) Where an interpreter also acts as the appellant's Authorized Representative, the appellant shall supply a signed written statement to that effect in both English and the primary language. If the appellant is a deaf or hearing-impaired person, one person shall not act as both interpreter and authorized representative.

343.160: Auxiliary Aids

Upon reasonable request DOH shall provide appropriate auxiliary aids to appellants who have impaired sensory, manual or speaking skills if such impairment would prevent adequate participation of the appellant at the hearing. DOH shall inform appellants of the availability of this assistance. DOH shall appoint an interpreter for an appellant who is deaf or hearing-impaired unless such appellant provides his or her own interpreter or such appellant knowingly and voluntarily signs a waiver of such assistance.

343.200: Adequate Notice Requirements

(A) In addition to the requirements of timely notice as stated in 106 CMR 343.140, a notice concerning an intended action to reduce, suspend or terminate assistance or to change the manner or form of payments to a protective, vendor, or two-party payment, or to deny a prior approval request for services, must be "adequate" in that it contains:

(1) A statement of the intended Department action;

(2) The reason(s) for the intended action;

(3) A citation to the regulation(s) supporting such action;

(4) An explanation of the recipient's right to request a fair hearing; and

(5) The circumstances under which assistance is continued if a hearing is requested.

(B) When changes in either federal or commonwealth law require automatic grant adjustments for classes of recipients, notice to the recipient shall be considered adequate if it includes a statement of the specific change in law requiring the action to reduce, suspend or terminate [instead of a citation to a Department regulation as stated in 106 CMR 343.200(A)(3)].

(C) Prior to a Department action to recoup an overpayment, a timely and adequate notice must be mailed to the recipient. In addition to the requirements of adequate notice as stated in the above, 106 CMR 343.200(A), the notice must contain:

(1) The amount to be repaid;

(2) The amount of the monthly deduction; and

(3) The duration of repayment.

343.210: Timely Notice Exceptions

The Department need not send a timely notice, but must send an adequate notice (as defined in 106 CMR 343.200), no later than the date of action when:

(A) There is factual information confirming the death of a recipient or the AFDC grantee-relative, and there is no relative to serve as a new grantee-relative;

(B) The Department receives a clear written statement signed by the recipient that the recipient no longer wishes assistance;

(C) The recipient has been admitted or committed to an institution and he or she is not eligible for further payments or service under any category of assistance;

(D) The recipient has been placed in a skilled nursing home, intermediate care facility or chronic hospital;

(E) A recipient's whereabouts are unknown and Department's mail directed to that person has been returned by the Postal Service indicating there is no known forwarding address. However, where AFDC, RRP or EAEDC is received, the recipient's check must be made available when whereabouts are made known during the period covered by the check; and the recipient's Medicaid or CommonHealth card must likewise be made available;

(F) An AFDC child is removed from the home by a court or is voluntarily placed in foster care by the grantee-relative; or

(G) An EAEDC recipient starts receiving Supplemental Security Income (SSI) benefits.

(H) The Department takes action because of information the recipient furnished in a monthly report or because the recipient has failed without good cause to submit a complete or timely monthly report;

(I) A decision is rendered for prior approval of services or by the Disability Determination Unit for MA or CommonHealth requests; and

(J) A special allowance granted for a specific period is terminated and the recipient has been informed in writing at the time of initiation that the allowance shall automatically terminate at the end of the specified period.

343.225: Notification of the Right to Request a Hearing

(A) At the time of application and at the time of any Department action affecting his or her assistance, each applicant or recipient shall be informed in writing of his or her right to a hearing, of the method by which a hearing may be requested, and of the right to an authorized representative (see 106 CMR 343.150).

(B) At any time that an applicant or recipient indicates disagreement with a Department action, he or she shall be informed of the right to request a fair hearing. The Department shall assist the applicant or recipient by providing an appeal form and, if requested, by helping with the completion of the form. The Department responsibility is to assure the unrestricted freedom to request a fair hearing.

(C) If there is an individual or organization that provides free legal representation, the person requesting a hearing shall be informed of the availability of that service.

343.230: Grounds for Appeal

(A) Applicants and recipients have a right to request a fair hearing in any of the situations described below. Institutions have the right to request a fair hearing only for items (1), (2), and (3) and 5(d) and (e). The institution, where applicable, must have exhausted all administrative procedures as described in 106 CMR 450.322. The right of the institution cannot, however, supersede the right of the applicant or recipient.

(1) Denial of an application or request for assistance or the right to apply or reapply for assistance (including supplemental payments) programs administered by the Department.

(2) The failure of the Department to give official notice of action on an application for financial assistance within 30 days or medical assistance or CommonHealth within 45 days after receiving the application.

(3) Any Department action concerning the suspension, reduction or termination of financial assistance, medical assistance or CommonHealth benefits.

(4) The failure of the Department to give official notice to the recipient of action taken on a request for increased assistance within 30 days of the denial, in whole or in part, of such a request.

(5) Unresolved disputes pertaining to:

a. Classification regarding employment on issues concerning the suitability of employment under EAEDC or AFDC;

b. Manner or form of payment including appropriateness of paying all or part of the standard budget as protective or vendor payments;

c. Scope and amount of payment;

d. Department decision to recoup an overpayment;

e. Level of care in a nursing home.

(6) Denial of a request for Emergency Assistance, or failure to give timely written notice to the applicant of action on such a request.

(7) Coercive or otherwise improper conduct as defined in 106 CMR 343.235 on the part of any Department employee acting in the capacity of a worker directly involved in the applicant's or recipient's case.

(8) Any condition of eligibility for assistance or receipt of assistance which is not authorized by regulations of the Department.

(9) The failure of the Department to act upon a request for assistance within the time limits required by Department regulations.

(10) The failure of the Department to pay up to the first $50 of monthly current support collected by the Child Support Enforcement Unit on behalf of the assistance unit.

(11) The Department's determination that the recipient is subject to the MassHealth/Managed Care program under 106 CMR 508.000 through 508.120.

(12) The Department's assignment of a Primary Care Clinician (PCC) under 106 CMR 508.110(B).

(13) The denial of a transfer from one provider to another provider under 106 CMR 508.110(D).

(14) The denial of prior service authorization under 106 CMR 508.160.

343.235: Coercive or Otherwise Improper Conduct

(A) Definitions

(1) Coercive conduct means knowingly compelling an applicant, recipient or former recipient by force, threat, intimidation, or other abuse of position to take action which is injurious to his or her best interest and which he or she would not otherwise have done.

(2) Improper conduct means reckless and unreasonable abuse of authority. Examples of improper conduct include, but are not limited to:

a. The worker recklessly and unreasonably violates a Department regulation or procedure in a manner which is directly injurious to the best interests of an applicant, recipient or former recipient.

b. The worker recklessly and unreasonably requires documents, visits or other actions by the applicant, recipient or former recipient which are not authorized by regulation or procedures of the Department.

c. The worker recklessly and unreasonably violates the confidentiality of the applicant, recipient or former recipient.

d. The worker recklessly and unreasonably fails to treat the applicant, recipient or former recipient with dignity and respect to which he or she is reasonably entitled.

e. The worker recklessly and unreasonably discourages the applicant, recipient or former recipient from applying for assistance or discourages the applicant, recipient or former recipient from inquiring concerning their rights or appealing.

(B) Remedies

When a referee has found coercive or otherwise improper conduct on the part of any Department employee acting in the capacity of a worker directly involved in the applicant's, recipient's or former recipient's case at a fair hearing, the local office director shall:

(1) assign a different worker; and

(2) initiate appropriate personnel action in accordance with 106 CMR 343.640 (B)(2) including the insertion of a written reprimand and a copy of the written findings, if any, in the worker's personnel file; and

(3) Where appropriate, require the worker to send a written apology to the recipient.

343.240: Request for Fair Hearing

(A) A request for a fair hearing is defined as a written statement by the appellant or his or her authorized representative which asks for the opportunity to present the case to a higher authority. The request for a fair hearing must be received by DOH within the time limits set forth in 106 CMR 343.140.

(B) Any request for a fair hearing which cites coercive or otherwise improper conduct on the part of a Department employee must state the name of the employee and the place(s), date(s) and nature of the incident(s). If the request lacks the information required by this section, DOH shall notify the appellant of the requirement. If the appellant then fails to provide the information within 10 days, the appeal shall be dismissed.

343.245: Dismissal of Request for a Hearing

(A) DOH shall dismiss a request for a hearing when:

(1) The request is not received within the time frame specified in 106 CMR 343.140.

(2) The request is withdrawn in writing by the appellant or his or her authorized representative.

(3) The sole issue is one of state or federal law requiring automatic adjustments for classes of recipients and the correctness of the grant computation is not an issue.

(4) The stated reason for the request is not grounds for appeal as specified in 106 CMR 343.230.

(5) The stated reason for the hearing request is outside the scope of this chapter as stated in 106 CMR 343.040.

(6) The party requesting the hearing has no standing in accordance with 106 CMR 343.050(A).

(B) The Director may, at his or her discretion, order a hearing scheduled to allow the appellant the opportunity to contest the dismissal.

343.250: Continuation of Benefits Pending Appeal

(A) If the Division of Hearings receives the request within the timely notice period, assistance shall be continued, or a change in the manner or form of payment to protective, vendor or two-party payment shall be postponed, until the appeal decision is rendered. If assistance has been terminated or reduced prior to a timely request for a hearing, assistance shall be reinstated. If the decision is adverse to the appellant, the proposed action shall take place immediately.

If a change affecting the recipient's grant occurs while the hearing decision is pending, the Department shall take appropriate action to implement the subsequent change affecting the grant, subject to the advance notice requirements and the right to assistance pending a hearing decision.

(B) Assistance pending a hearing shall not be granted if the Department has granted assistance on a presumption of eligibility and subsequently determines that the recipient is ineligible, and said determination is the subject of a hearing request.

(C) Assistance continued pending the appeal in accordance with 106 CMR 343.250(A) is subject to recoupment by the Department.

343.300: Notification of Hearing

(A) The time, date, and place of the hearing shall be arranged so that the hearing is accessible to the appellant. At least 10 days' advance written notice shall be mailed to all parties involved to permit adequate preparation of the case. However, the appellant or his representative may request less advance notice to expedite the scheduling of the hearing.

(B) The notice shall contain the following:

(1) Date, Time and Site of Hearing

(2) Contact Person in the Division of Hearings

The name, address, and phone number of the person to notify in DOH in the event it is not possible for the appellant to attend the scheduled hearing.

(3) Fair Hearing Procedures

An explanation of the Department's hearing procedures and any other information which will provide the appellant with an understanding of the proceedings and contribute to the effective presentation of the appellant's case, including the right to counsel or authorized representation at the appellant's expense.

(4) The Right to Examine the Case File

A statement that the appellant or representative may examine the case file prior to the hearing.

(5) Dismissal of Appeal for Failure to Appear

A statement to the appellant indicating that the Department will dismiss the hearing request if the appellant or his representative fails to appear for the hearing without good cause.

343.310: Scheduling

Upon receipt of a request for a fair hearing, DOH will register the appeal, set a date for a hearing and so notify the appellant, the appropriate office of the Department, and if applicable, the Department employee against whom allegations of coercive or otherwise improper conduct have been made.

It shall further designate a site for the hearing accessible to the appellant. If the appellant has a handicap or disability which reasonably prevents his or her appearance at the designated site, he or she may request that the hearing be held at his or her home or other accessible location.

343.320: Procedures and Requirements for Rescheduling

(A) Rescheduling Prior to the Day of the Hearing

(1) DOH may change the date, time, and place of the hearing upon due notice to the parties involved.

(2) For all hearings, (except for initial scheduled hearings involving any aspect of the food stamp program where good cause for rescheduling need not be demonstrated) for good cause shown as defined in (D) below, DOH may at the request of either party to a hearing, or a Department employee charged with coercive or otherwise improper conduct, reschedule the hearing provided that the request is received prior to the date of the hearing. If the director or his or her designee concludes that the request does not constitute good cause, the request shall be denied. When such a request is denied, the appellant shall have the right to a hearing on the issue of good cause. If the request is approved, the requesting party will be required to establish at the rescheduled hearing good cause for the prior nonappearance. A finding by the Referee that good cause has not been shown shall result in dismissal of the appeal.

(3) DOH shall inform the parties of the procedures set forth above.

(B) Rescheduling Following Failure to Appear at a Scheduled Hearing

(1) If the appellant fails to appear at the hearing, DOH shall notify the appellant in writing (at the address supplied by the appellant) that if he or she fails to request a rescheduled hearing and show good cause for the failure to appear within 10 days of the notice, the appeal will be considered abandoned. If, in the determination of the director or his or her designee, good cause has not been shown, the appeal shall be dismissed subject to the vacate procedures set out at (C) below and aid pending shall be discontinued. The director of DOH or his or her designee may at his or her discretion reschedule the hearing to another date at which time the appellant will be required to establish good cause for the failure to appear. A finding by the referee that good cause has not been shown shall result in dismissal of the appeal.

(2) In cases in which coercive or otherwise improper conduct has been alleged against a Department employee and the employee fails to appear at the hearing after due notice, the referee shall proceed with the hearing in his or her absence.

Whether or not the employee is present, the referee shall make a decision on the basis of evidence produced at the hearing. If the Department employee fails to appear at the hearing, he or she may file a written request with the referee within five days of the hearing that the hearing be reopened. Such requests shall be granted by the referee only for good cause shown for the failure to appear.

(C) Procedures for Vacating a Dismissal

(1) The appellant shall be informed by written notice of the dismissal and of the procedures for requesting that the dismissal be vacated.

(2) A request to vacate a dismissal must be in writing and must be signed by the appellant or his or her authorized representative. Such request must be received by DOH within 10 days of the date of the dismissal notice. A dismissal shall be vacated by the director of DOH or his or her designee upon a finding that the appellant has shown good cause for:

a. Failure to appear at a scheduled hearing; and

b. Failure to inform DOH prior to the date of a scheduled hearing of his or her inability to appear at that hearing.

(D) Good Cause

(1) The following circumstances shall constitute good cause subject to (2) below:

a. A death in the family;

b. A personal injury or illness which reasonably prevents the party from attending the hearing;

c. A sudden and serious emergency which reasonably prevents the party from attending the hearing;

d. An obligation or responsibility which a reasonable person in the conduct of his or her serious affairs would conclude takes precedence over attendance at the hearing;

e. The need for additional time to produce evidence or witnesses or obtain legal assistance.

(2) In evaluating a party's good cause claim, the referee shall consider the following factors:

a. The amount of time during which the party had advance notice of the hearing;

b. The party's ability to anticipate the circumstances which resulted in his or her inability to appear for the hearing;

c. The party's ability to reschedule the conflicting event;

d. Delay by the party in notifying DOH of his or her inability to attend the hearing;

e. Previous rescheduling requests or failure to appear for scheduled hearings which indicate a pattern of abuse or neglect of the hearings process.

(3) If a party will be required to show good cause at the hearing, DOH shall notify that party in advance that the referee will address that issue. The party shall also be notified of the advantage of bringing documentation and witnesses in support of the good cause claim and of the possible consequences if the referee finds against the party on this issue.

343.330: Dismissal for Failure to Prosecute

When the record discloses the failure of the appellant to file documents required by these rules, respond to notices of correspondence, or comply with orders or when the appellant otherwise indicates intention not to continue with the prosection of his or her appeal, DOH may issue an order requiring the appellant to show cause why the matter should not be dismissed for lack of prosecution. The show cause determination shall be made by the director of DOH, except in cases where the hearing has been scheduled and a referee has been designated to conduct the hearing, the determination shall be made by the referee. If the appellant is found to have failed to show such cause, the appeal shall be dismissed with or without prejudice.

343.340: Right to Examine Case File and Documents, or "Discovery"

The appellant and his or her authorized representative shall have reasonable opportunity to examine the entire contents of his or her case file, subject to the Fair Information Practice requirements set forth in 106 CMR, et seq., as well as all documents and records to be used by the Department at the hearing. An appointment must be scheduled in advance with the appellant's worker for examination of the case file.

343.350: Adjustment Procedures

(A) Local Office Procedures

(1) The worker is primarily responsible for dealing with complaints from applicants or recipients. Dissatisfaction on the part of applicants or recipients may result from a lack of knowledge or understanding of the regulations which govern Department policies and procedures. Ordinarily, complaints may be resolved with an explanation of the regulations by the worker. If the worker's explanation is not satisfactory, the worker's immediate supervisor shall be available to respond to the complaint. If the complaint cannot be resolved, the Department shall remind the applicant or recipient of the right to request a fair hearing.

(B) Prehearing Adjustment

(1) The Department may make an adjustment in the matters at issue prior to a hearing. If the adjustment resolves the issue and the appellant wishes to withdraw his or her appeal, the Department shall transmit to DOH the appellant's written withdrawal which contains the conditions of the adjustment and the signature of the worker. DOH shall not delay a fair hearing because a possible adjustment is under consideration unless the appellant requests such a delay.

(2) If the appellant and the Department resolve the issue(s) appealed at the hearing, they may agree to proposed language for the referee's decision. The referee, at his or her discretion may accept such proposals.

(3) Any adjustment arising from allegations of coercive or otherwise improper conduct must be assented to by the Department, the appellant, and the Department employee.

343.360: Subpoenas

(A) A subpoena is a document which commands a witness to appear at a given time to give testimony before a court or an administrative proceeding such as a fair hearing. A subpoena can also require the witness to produce before the court or administrative proceeding any books, documents, papers or records in his possession or control.

(B) Right to Subpoena

Any party to a hearing and DOH on its own shall have the right to a subpoena requiring the attendance and testimony of witnesses and the production of any evidence including books, records, correspondence or documents relating to any matter in question at the hearing. Any party may

(1) Have such subpoena issued by a notary public or justice of the peace in the name of DOH, or

(2) Apply to DOH in writing for the issuance of such subpoena. A subpoena shall be issued within two working days of receipt of the application.

(C) Petition to Vacate Subpoena

Any witness subpoenaed may petition the director of DOH to vacate or modify a subpoena.

(1) The Director shall in an informal manner give the party who requested the issuance of the subpoena notice of such petition orally or in writing. The notice shall quote the contents of the petition and shall indicate that the party may oppose the petition orally or, if time permits, in writing to the Director. If time does not permit a party to respond to the request to vacate, the hearing shall be postponed long enough to permit the party to respond to the petition. This procedure shall not be construed to require a hearing or adjudicatory proceeding.

(2) After such investigation as the Director considers appropriate, the Director may grant the petition in whole or in part upon a finding that:

a. The testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question, or

b. The subpoena is unreasonable or oppressive, or

c. The subpoena has not been issued a reasonable period in advance of the time when the evidence is requested.

Unless the Director finds that at least one of the above conditions exists, the Director shall deny the petition.

(D) Failure to Comply with a Subpoena

If any person fails to comply with a properly issued subpoena, the DOH (or the party who requested the subpoena) may petition the Superior Court for an order requiring compliance with the terms of the subpoena. If the Superior Court issues such an order and any person who is subject to it does not comply with it, he or she will be subject to the contempt powers of the Court.

343.410: Rights of the Appellant

The appellant shall have the right to:

(A) Be assisted by an authorized representative as provided in 106 CMR 343.150;

(B) Present witnesses;

(C) Examine and introduce evidence from his or her case record, and examine and introduce any other pertinent Department documents;

(D) Present and establish all relevant facts and circumstances by oral testimony and documentary evidence;

(E) Advance any pertinent arguments without undue interference;

(F) Question or refute any testimony, and confront and cross-examine adverse witnesses.

343.420: Department Rights and Responsibilities

The Department can present its case or can request the assistance of a Department attorney. The Department shall

(A) Submit at the hearing all evidence on which any decision at issue is based;

(B) Designate a staff person or Department representative to represent the Department at the hearing and arrange for adequate space for the hearing;

(C) Present witnesses when appropriate and, if necessary, may subpoena witnesses upon request to DOH;

(D) Ensure that the case record is present at the hearing and that the appellant has adequate opportunity to examine it prior to and during the hearing;

(E) Introduce into evidence material from the case record and other pertinent Department documents which pertain to the issue raised during the hearing and which are nor otherwise confidential;

(F) Present and establish all relevant facts and circumstances by oral testimony and documentary evidence;

(G) Have the right to advance any pertinent arguments without undue interference;

(H) Have the right to question and refute any testimony and confront and cross-examine adverse witnesses;

(I) Arrange for the appearance at the hearing of a representative of other programs, if appropriate.

343.430: Responsibilities of the Department Attorney

An attorney for the Department may appear at the request of the Department, the Medical Division, or DOH. Such appearance shall be for the purpose of representing the interests of the Department.

343.440: Rights of the Department Employee

Any Department employee against whom allegations of coercive or otherwise improper conduct have been made may present his or her own case or may be assisted by an authorized representative(s) and shall have the right to:

(A) Be assisted by an authorized representative at his or her own expense in accordance with 106 CMR 343.150;

(B) Bring witnesses or subpoena witnesses upon request to DOH;

(C) Present and establish all relevant facts and circumstances by oral testimony and documentary evidence;

(D) Advance any pertinent arguments without undue interference;

(E) Question or refute any testimony and confront and cross-examine adverse witnesses;

(F) Examine and introduce any pertinent evidence, including material from the case record.

343.450: Powers and Duties of the Hearing Official

(A) The hearing official shall have the following duties:

(1) To administer the oath or affirmation to anyone who will testify at the hearing and to an interpreter/translator;

(2) To assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the parties;

(3) To ensure an orderly presentation of the evidence;

(4) To ensure that all parties have a full opportunity to present their claims orally or in writing and to secure witnesses and evidence to establish their claims;

(5) To receive, rule on, exclude, or limit evidence;

(6) To introduce into the record by reference or production any regulations, statutes, memoranda, or other materials he or she believes relevant to the issues at the hearing;

(7) To ensure a record is made of the proceedings;

(8) To render a fair, independent and impartial decison based on the issues and evidence presented at the hearing and in accordance with the law and to order Department action if appropriate; and

(9) To inform appellants who are not fluent in English of the right to a full and accurate interpretation by their own interpreter, or by a Department-provided interpreter. The hearing official shall conduct the bilingual hearing in accordance with the guidelines for conducting hearings through interpretation in the Manual for Welfare Referees. The purpose of the guidelines is to enable non-English speaking appellants to understand and to participate in the entire hearing as fully as if the appellants were fluent in English. To achieve this end, all statements, including questions, answers, and comments, of the appellant, hearing official, witnesses, and any other persons participating in the hearing, shall be fully translated without alteration of such statements, such as by changing from the first person to the third person.

(B) The hearing official shall have the following powers:

(1) To limit attendance at the hearing, at his or her discretion;

(2) To change the date, time, or place of the hearing on his or her own motion or at the request of any party, upon due notice to the parties;

(3) To request a statement of the issue(s) and define the issue(s);

(4) To regulate the presentation of evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensive record of the proceedings;

(5) To issue subpoenas on his or her own motion or upon request of any party to secure the presentation of evidence or testimony;

(6) To examine witnesses and ensure that relevant evidence is secured and introduced;

(7) To continue the hearing to a subsequent date to permit either party to produce additional evidence, witnesses, or other materials;

(8) To authorize, when appropriate, the Department to pay for the costs of an independent medical examination;

(9) To rule on any requests that may be made during the hearing;

(10) To reconvene the hearing at his or her discretion at any time prior to the rendering of the decision in accordance with 106 CMR 343.600; and

(11) To order, at his or her discretion, written briefs to be submitted provided that all parties shall be notified of the submission of the briefs and have opportunity to answer.

343.500: Evidence

(A) General

The rules of evidence observed by courts shall not apply to fair hearings, but the hearing official shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Unduly repetitious or clearly irrelevant evidence may be excluded.

The referee shall not exclude evidence at the hearing for the reason that it had not been previously submitted to the Department, provided that the referee may permit the Department representative reasonable time to respond to newly submitted evidence. The effective date of any adjustments to the appellant's grant level or eligibility status shall be the date on which all eligibility conditions were met, regardless of when the supporting evidence was submitted.

(B) Presentation at Hearing

Except as the referee may otherwise order within his or her discretion in accordance with 106 CMR 343.600 and 343.610, any evidence on which a decision is based must be presented at the hearing. Copies of any evidence not submitted at the hearing shall be provided to all other parties who shall then have the opportunity to respond.

(C) Oral Testimony

Oral testimony shall be given under oath or affirmation. Witnesses shall be available for examination and cross-examination.

(D) Regulations, Statutes, Memoranda

Regulations and statutes may be put into evidence by reference to the citation or by submitting a copy of the regulations. Memoranda and other materials may be put into evidence by submission of the original or copy thereof.

(E) Stipulations

Stipulations of facts or stipulations as to the testimony that would have been given by an absent witness may, if agreed upon by the parties, be used as evidence at the hearing.

(F) Additional Evidence

The referee may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any relevant matter.

343.510: Hearing Involving Medical Issues

When the hearing involves medical issues, the referee may upon his or her own motion order that a medical examination and assessment be obtained from an impartial medical practitioner designated by the Director of DOH. Such examination and assessment shall be made a part of the record and shall be at the expense of the Department.

343.520: Interim Orders

(A) If the referee determines at the hearing that the sole issues is the legality of state or federal law or regulation, or change in federal or state law, he or she shall issue a written interim order denying the appeal and directing the Department to proceed with the planned action, which action was delayed pending the hearing. The order shall be made a part of the record. A final written decision must also be rendered.

(B) The referee may further order, in writing, the Department to take immediate action to implement a decision announced at the hearing pending issuance of the decision.

343.530: Continuance

Once a hearing has been opened, it may be continued at the discretion of the referee. All parties shall be notified as to the time, date, and place of the continued hearing.

343.540: Consolidated Hearings

DOH may respond to a series of individual requests for hearings by conducting a single group hearing. DOH may consolidate only cases where the sole issue is one of state and/or federal law, regulation or policy and where individual issues of fact are not disputed. In all group hearings, the regulations governing individual hearings must be followed. Each appellant shall be permitted to present his or her own case or have the case presented by a representative.

343.550: The Record

(A) All documents and other evidence offered and taken shall become part of the record. The record shall further contain tape recordings or transcripts of the proceedings and all exhibits and documents introduced at the hearing and, wherever applicable, medical documents obtained to resolve medical issues. The record shall be the exclusive source of the referee's decision. For purposes of judicial review, the record shall also include the decision.

(B) All evidence and testimony at the hearing shall be recorded either electronically or stenographically.

(1) At the discretion of the referee, any party may record the hearing.

(2) Regardless of whether an appellant intends to file a Complaint for Judicial Review, transcripts or duplicate tapes of the proceedings shall be supplied, upon request by the appellant, at his or her expense. The record shall be open for inspection by any party or his or her authorized representative during the regular business hours of DOH.

343.600: Reopening Prior to Decision

After the close of the hearing and prior to a decision, the referee, if he or she finds need to consider further testimony, evidence, materials or legal rules before rendering his or her decision, may reopen the record or, if appropriate, the hearing to consider such further information. If he or she so decides, he or she must send seven days' written notice to all parties of the reopening and his or her reasons therefor, including the date, time and place of the resumed hearing, which shall be held at a location accessible to the appellant. Prior to a hearing decision, any party to a hearing may request in writing that the referee exercise his or her power hereunder, which request shall become part of the record.

343.610: Basis of Fair Hearing Decisions

(A) The referee's decision is based upon evidence, testimony, materials and legal rules presented at the hearing. Any evidence, testimony, materials, legal rules or arguments presented after the close of the hearing will be excluded unless the hearing is reopened, the parties stipulate procedures for response, or otherwise waive the right to respond.

(B) The decision shall be based upon a preponderance of evidence.

(C) (1) The decision must be rendered in accordance with the law. The law includes the State and Federal Constitutions, statutes, and duly promulgated regulations, as well as decisions of the State and Federal Courts.

(2) Notwithstanding (1) above, referees shall not render decisions which require their determination of the legality of the Department's regulations. If the legality of the Department regulations is at issue, the referee shall render a decision that he or she cannot rule on that issue and shall base his or her decision on the applicable regulation.

(3) The Department memoranda and materials containing legal rules, standards, or interpretations which are not in the form of duly promulgated regulations cannot be relied on as the sole basis for the decision.

(4) However, where the Departmental procedures or policies are pertinent, they may be entered into evidence. Time to respond in writing to those items admitted into evidence may be allowed by the referee upon request by the appellant.

343.620: Content of Decision

(A) The decision of the referee shall contain the following:

(1) Statement of the issues involved in the hearing;

(2) Summary of evidence;

(3) Findings of fact on all relevant factual matters;

(4) Rulings of law on all relevant legal issues, with citations to supporting regulations or other law;

(5) Conclusions drawn from the findings of fact and rulings of law if appropriate;

(6) Order of the referee which shall order appropriate action to be taken by the Department including, if appropriate, retroactive and/or prospective relief.

(B) The referee shall also notify the appellant of his or her right to full and prompt implementation of the decision in accordance with 106 CMR 343.640. The appellant shall be further notified of this right to judicial review in accordance with 106 CMR 343.720.

343.625: Transmittal of Decision

Copies of the decision shall be forwarded to the appellant, the appellant's authorized representative, interpreter (if requested) and appropriate Departmental offices. The appellant and his or her authorized representative shall also be notified in writing of the right of judicial review.

343.630: Finality of the Appeal Decision

The decision of the referee shall be final and binding on the Department. The Department shall not interfere with the independence of the decision-making process of the referee. Facts found and issues decided by the referee in each case are binding on the parties to that case and cannot be disputed again between them in any other administrative proceeding, except as provided in 106 CMR 343.700 or otherwise provided by law.

343.640: Implementation of the Appeal Decision

(A) Notification to Appellant

When the decision is issued, DOH shall notify the appellant of his or her right to full and prompt implementation of the decision within 30 days. The notice shall direct the appellant to notify the appropriate Department official in writing if there is not full compliance within 30 days.

(B) Responsibility to the Department

(1) The Department shall be responsible for the full and prompt implementation of all fair hearing decisions so that the appellant will receive any benefits due within 30 days of the date of the decision. No official or any other employee of the Department shall obstruct or otherwise interfere with, review, change or attempt to influence the implementation of the fair hearing decision.

(2) In a case where the appeals referee has found coercive or otherwise improper conduct on the part of the Department employee, the referee shall refer the record, together with the findings and any supporting documents, directly to the Commissioner or his or her designee, who shall determine what disciplinary action, if any, is appropriate and shall take such action within 30 days of the date of the decision. The remainder of this section does not apply to appeal decisions where the sole finding is coercive or otherwise improper conduct on the part of a Department employee.

(C) Procedure for Monitoring Implementation

The Department shall monitor approved and denied appeal decisions to ensure implementation and compliance within 30 days of the decision.

(D) Expedited Appeals for Denied Acute Hospital Admission

When a recipient or hospital has requested an expedited appeal of a denial of payment for an elective hospital admission, pursuant to 106 CMR 343.140(E), the Department shall comply with the decision of the referee as soon as possible, but no later than seven days from the date of the decision. The referee's decision pertaining to such appeal establishes whether the Department will approve the admission and, if applicable, determines the length of stay; however, the referee's decision does not establish whether medical care provided following the admission is medically necessary.

343.700: Review of Referee Decisions in Medical Assistance or CommonHealth Only

The Commissioner (but not his or her designee) may, for good cause shown, direct the Director of DOH (but not his or her designee) to conduct a rehearing of a Medical Assistance appeal or an appeal under the CommonHealth program, provided the request is received by the Commissioner within 14 calendar days of the date of the referee's decision. An order to conduct a rehearing shall not be construed as indicating any position by the Commissioner on the merits of the appeal. The director shall send a seven days' written notice to all parties, including the date, time and place of such rehearing, which shall be held at a location convenient to the person appealing, and after such rehearing the director may, not later than 30 days after the order to conduct a rehearing, issue a superseding decision.

343.710: Remand of Referee Decisions

Following the issuance of a decision of the Division of Hearings, the Commissioner, upon the recommendation of the General Counsel and for good cause shown, may remand a case for further consideration by the referee who rendered the original decision. A petition to the Commissioner for a remand must be received within 14 calendar days following issuance of the referee's decision.

343.720: Judicial Review

If the appellant is dissatisfied with the final decision of the referee, he or she may exercise the futher right of judicial review in accordance with Chapter 30A of The Massachusetts General Laws. If the appellant wishes to have judicial review, he or she must file a complaint with the Superior Court in the county where he or she resides or has his or her principal place of business, or in Suffolk County within 30 days after receipt of the fair hearing decision. If the appellant requests a rehearing or petitions for remand, then the decision following the rehearing or remand, or the denial of the request for the rehearing or remand, is the Department's final action and the appellant has 30 days from the final action to file a Complaint for Judicial Review. The Department must notify the appellant and his or her authorized representative of his or her right to seek judicial review and of the time limits for seeking said review.

343.730: Access to the Record

The record of the fair hearing shall be provided to the appellant within the appropriate time limits after filing a Complaint for Judicial Review. DOH will provide access to the record of the hearing in accordance with 106 CMR 343.550(B)(1)(2). Such access may be accomplished by allowing the appellant or his or her representative to examine all the documentary evidence and to listen to the tape recording or to review the hearing with the stenographer, if applicable.